

STATE EMERGENCY RESPONSE COMMISSION

EMERGENCY PLANNING

AND

COMMUNITY RIGHT-TO-KNOW

§55-1-1. General

1.1 Scope: These rules establish the procedures necessary by the West Virginia State Emergency Response Commission for the implementation of Title III of the Superfund Amendments and Reauthorization Act of 1986 and W.Va. Code §15-5A-1 et seq. for the purpose of developing comprehensive emergency response plans and to establish a program for the collection and dissemination to the public of information on certain hazardous and toxic chemicals in communities throughout West Virginia.

1.2 Authority: These rules are issued under authority of W.Va. Code §15-5A-5.

1.3 Effective Date:

1.4 Filing Date:

1.5 Applicability: This regulation applies to all facilities covered pursuant to Title III of the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §11001 et seq.

§55-1-2. Definitions.

2.1 The following terms shall have the meaning described by this section:

2.1.1 "Emergency planning district" means a geographic area designated by the SERC as requiring its own comprehensive emergency response plan. The SERC may designate existing political subdivisions or multijurisdictional planning organizations as such districts.

2.1.2 "Facility" means all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person) and subject to the provisions of Section 302 of Title III, 42 U.S.C. §11002.

2.1.3 "LEPC" means a Local Emergency Planning Committee, for each emergency planning district, which is appointed by the SERC in accordance with the provisions of W.Va. Code §15-5A-7.

2.1.4 "SERC" means the State Emergency Response Commission, a statutory body created pursuant to W.Va. Code §15-5A-1 et seq.

2.1.5 "Title III" means the Emergency Planning and Community Right-to-Know Act of 1986, as amended, and the regulations promulgated thereunder. 42 U.S.C. §11001 et seq.' P.L. 99-499.

2.1.6 "Emergency notification" means the notification required by Section 304 of Title III, 42 U.S.C. §11004, which must be given immediately in the event of a release of a listed hazardous substance that exceeds the reportable quantity for that substance.

2.1.7 "Emergency response plan" means the plan to be developed by each Local Emergency Planning Committee in accordance with W.Va. Code §15-5A-7 and 42 U.S.C. §11003.

2.1.8 "Hazardous chemical inventory form" means the Emergency and Hazardous Chemical Inventory Form that must be submitted by covered facilities to the SERC, the LEPC and the local fire department which has jurisdiction over the facility.

2.1.9 "List of MSDS Chemicals" means a list of chemicals submitted to the SERC, the LEPC and the local fire department in lieu of the requirement to submit copies of MSDS.

2.1.10 "MSDS means material safety data sheet, a form required by the Occupational Safety and Health Act of 1970, as amended, and the regulations promulgated thereunder, 29 U.S.C. §651 et seq., and in accordance with the Federal Occupational Safety and Health Administration's Hazard Communication Standard, 40 C.F.R. 1910.1200, for reporting health and safety information on hazardous substances.

2.1.11 "Toxic chemical release form" means the form that must be reported annually of toxic chemical releases on a Toxic Chemical Release Reporting Form to the EPA and a State Official designated by the Governor pursuant to Section 313 of Title III, 42 U.S.C. §11023.

2.1.12 "EPA" means the United States Environmental Protection Agency, its Administrator and the Administrator's designee.

2.1.13 "Threshold quantity" means the amount of a substance present at a facility in which a facility becomes subject to the provisions of Title III, 42 U.S.C. §11002.

2.1.14 "Gasoline dispensing facility" means any retail site where gasoline is transferred from a stationary storage tank to a motor vehicle gasoline tank used to provide fuel to the engine of that motor vehicle.

2.1.15 "Oil and gas extraction storage facility" means a facility that exclusively stores crude oil or liquid hydrocarbons or other fluids resulting, obtained or produced in connection with the production or storage of crude oil or natural gas; receives the crude oil liquid hydrocarbon or other stored fluids by direct conveyance through piping or tubing; is located on the same site as, or on a site adjacent to, the well from which the crude oil, liquid hydrocarbons, or other fluids are produced or obtained; and is used for the storage of the crude oil, liquid hydrocarbons or other fluids prior to their transportation off the premises of the facility for sale, use or disposal.

2.2 Terms not defined in these regulations, nor having a meaning ascribed to them pursuant to W.Va. Code §15-5A-3, shall have the meaning and definition ascribed 42 U.S.C. §§11001 to 11050 and in 40 C.F.R. Parts 350, 355 and 370 inclusive of the appendices corresponding to Part 355.

§55-1-3. Reporting by Covered Facilities.

3.1 The owner or operator of a facility shall prepare and submit MSDS or list of MSDS chemicals to the SERC, the LEPC and the local fire department with jurisdiction over the facility containing the information required by and in accordance with Section 311 of Title III, 42 U.S.C. §11021.

3.2 The owner or operator of a facility shall prepare and submit hazardous chemical inventory forms to the SERC, the LEPC and the local fire department with jurisdiction over the facility containing the information required by and in accordance with Section 312 of Title III, 42 U.S.C. §11022.

3.3 The owner or operator of a facility shall prepare and submit toxic chemical release forms to the SERC as required by and in accordance with Section 313 of Title III, 42 U.S.C. §11023.

§55-1-4. Emergency Notification.

The owner or operator of a facility subject to this rule shall provide emergency notification of any release as required by and in accordance with Section 304 of Title III, 42 U.S.C. §11004 which provisions are hereby made a part of this rule and are incorporated by reference.

§55-1-5. Requests for Information - General Provisions.

5.1 Subject to the restrictions set forth in this rule and in Title III, the following records and information are available for public review:

5.1.1 MSDS submitted pursuant to Section 311 of Title III, 42 U.S.C. §11021.

5.1.2 List of MSDS chemicals for which a MSDS is required as described in Section 311(a)(2) of Title III, 42 U.S.C. §11021(a)(2).

5.1.3 Emergency response plan prepared and submitted pursuant to Section 303 of Title III, 42 U.S.C. §11003.

5.1.4 Hazardous chemical inventory forms (Tier I) prepared and submitted pursuant to Section 312 of Title III, 42 U.S.C. §11022.

5.1.5 Hazardous chemical inventory forms (Tier II) prepared and submitted pursuant to Section 312 of Title III, 42 U.S.C. §11022.

5.1.6 Follow up emergency notice provided in accordance with Section 304 of Title III, 42 U.S.C. §11004(c).

5.1.7 Toxic chemical release forms submitted pursuant to Section 313 of Title III, 42 U.S.C. §11023.

5.1.8 List of facilities required to report and submit data pursuant to Title III, 42 U.S.C. §11001 et seq.

5.2 Any person may review and request the information described in Section 5.1 of this rule during normal working hours of the Office of Emergency Services located in Room EB-80, Building 1 of the State Capitol Complex.

5.3 Any person may request, in writing, the information described in Section 5.1 of this rule by delivering or mailing such request to the SERC at the following address:

State Emergency Response Commission
c/o Office of Emergency Services
Building 1, Room EB-80
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

5.3.1 Any request submitted to the SERC must identify with specificity the information requested.

5.3.2 If the written request does not adequately identify the specific public record requested, the SERC will notify the person making the request that additional information is needed before the request can be processed.

5.4 Any person may request, in writing, the information described in Section 5.1 of this rule by mailing such request to the LEPC within which a facility is located.

5.4.1 Any request submitted to the LEPC must identify with specificity the information requested.

5.4.2 If the written request does not adequately identify the specific public record requested, the LEPC will notify the person making the request that additional information is needed before the request can be processed.

5.5 Processing of Requests.

5.5.1 Upon receipt of a written request for information, the SERC or the LEPC will note the date and process the request, which includes one of the following actions:

5.5.1.a Furnish the requested information along with an invoice for the cost of reproducing the information;

5.5.1.b Advise the requestor of the time and place where the records may be inspected;

5.5.1.c Request more specific information in order to process the request;

5.5.1.d If the record is not available but was required to have been filed with the SERC and can be obtained by the SERC, advise the requestor that the record will be obtained; or

5.5.1.e Deny the request stating one of the following reasons:

5.5.1.e.A The record is not known to exist;

5.5.1.e.B The record is not required to be submitted pursuant to the provisions of Title III, 42 U.S.C. §11001 et seq. or W.Va. Code §15-5A-1 et seq.; or

5.5.1.e.C The record is exempt from disclosure under the provisions of Title III, W.Va. Code §15-5A-1 et seq. or this rule.

§55-1-6. Requests for MSDS Information.

6.1 If any owner or operator of a facility submits a list of MSDS chemicals under Section 3.1 of this rule, the owner or operator, upon request by the SERC or the LEPC within which the facility is located, shall submit the MSDS for any chemical on the list to the LEPC.

6.2 Upon the request of any person, the SERC or the LEPC within which a facility is located, shall make available a MSDS to the person in accordance with Section 5 of this rule. If the LEPC does not have the requested MSDS, the SERC or the LEPC shall request the MSDS from the facility owner or operator and then make the

MSDS available to the person in accordance with Section 5 of this rule.

§55-1-7. Requests for Hazardous Chemical Inventory Forms.

7.1 Tier II hazardous chemical inventory forms shall consist of the following information for each hazardous chemical present at the facility, but only upon request and in accordance with Sections 5, 7 and 8 of this rule:

7.1.1 The chemical name or the common name of the chemical as provided on the MSDS;

7.1.2 An estimate (in ranges) of the maximum amount of the hazardous chemical present at the facility at any time during the preceding calendar year;

7.1.3 An estimate (in ranges) of the average daily amount of the hazardous chemical present at the facility during the preceding calendar year;

7.1.4 A brief description of the manner of storage of the hazardous chemical;

7.1.5 The location at the facility of the hazardous chemical; and

7.1.6 An indication of whether the owner elects to withhold location information of a specific hazardous chemical from disclosure to the public under Section 8 of this rule.

7.2 Any person may request Tier II information with respect to a specific facility by submitting a written request to the SERC or the LEPC in accordance with Section 5 of this rule, subject to the restrictions set forth in Sections 7.3, 7.4 and 7.5 of this rule.

7.3 If the SERC or the LEPC does not have in its possession the Tier II information requested in Section 7.2 of this rule, it shall request a submission of the Tier II information from the owner or operator of the facility that is subject of the request, provided that the request is from a state or local official acting in his or her official capacity, or the request is limited to hazardous chemicals stored at the facility in an amount in excess of 10,000 pounds.

7.4 If the request under Section 7.2 of this rule does not meet the requirements of Section 7.3 of this rule, the SERC or the LEPC may request submission of the Tier II information from the owner or operator of the facility that is the subject of the request if the request includes a general statement of need.

7.5 Trade Secret information shall be withheld in accordance with Title III, 42 U.S.C. §11042, the regulations promulgated thereunder, and Section 8 of this rule.

§55-1-8. Trade Secrets and Confidential Information.

8.1 The provisions of Title III, 42 U.S.C. §11042 and 40 C.F.R. Part 350, which relate to assertion of claims of trade secrecy are incorporated by reference and made a part of this regulation.

8.2 Owners or operators of facilities required to submit information pursuant to the provisions of Title III, which submit information claimed as "confidential" or "trade secret" must satisfy the following criteria in order to protect such information from disclosure:

8.2.1 The information has not been disclosed to any person other than a member of the LEPC, a government official, an employee of the facility or someone bound by a confidentiality agreement;

8.2.2 The facility has taken and will continue to take measures to protect confidentiality;

8.2.3 The information is not required to be disclosed to the public under any other federal or state law;

8.2.4 The information is likely to cause substantial harm to the competitive position of the facility;

8.2.5 The chemical identity is not readily discoverable through reverse engineering;

8.2.6 The chemical identity is included in the facility's reports to EPA; and

8.2.7 The facility must substantiate any trade secret claims with the EPA.

8.3 All reports received meeting the criteria of this Section 8 of this rule shall not be available for distribution as public information.

8.4 Any fire department, governmental agency or governmental official shall not disclose trade secret information to the public or any other person unless required or permitted pursuant to Title III and the rules promulgated thereunder, W.Va. Code §15-5A-1 et seq. or this rule.

§55-1-9. Fees.

9.1 All facilities required to submit hazardous chemical inventory forms or MSDS required by Sections 311 and 312 of Title III, 42 U.S.C. §§11021 and 11022, respectively, shall pay the fees set forth in this section. All fees collected shall be deposited into a subaccount of the SERC and may only be used for purposes

authorized by W.Va. Code §15-5A-1 et seq.

9.2 A one-time emergency planning notification fee of one hundred (\$100) dollars shall be paid by a facility when it submits the emergency planning notification required under Sections 302 and 303 of Title III, 42 U.S.C. §§11002 and 11003.

9.3 Except as provided in Sections 9.6, 9.7, 9.8 and 9.9, an annual inventory fee of twenty-five (\$25) dollars shall be paid by a facility when it submits hazardous chemical inventory forms or MSDS as required under Sections 311 and 312 of Title III, 42 U.S.C. §§11021 and 11022.

9.4 An owner or operator of a facility subject to inventory reporting which has present in excess of five hazardous chemicals in an amount equal to or above the threshold quantity shall pay an additional annual inventory filing fee of ten (\$10) dollars per hazardous chemical for each hazardous chemical in excess of five. This fee does not apply if the hazardous chemical reported on the hazardous chemical inventory form is also an extremely hazardous substance to which the additional annual inventory filing fee is imposed by Section 9.5 of this rule.

9.5 An owner or operator of a facility subject to inventory reporting shall pay an additional annual inventory filing fee of fifty (\$50) dollars per extremely hazardous substance for each extremely hazardous substance reported on the hazardous chemical inventory form.

9.6 An owner or operator who is required to submit a hazardous chemical inventory form for not more than thirty-five oil and gas extraction storage facilities shall pay an annual fee of twenty-five (\$25) dollars.

9.7 An owner or operator who is required to submit a hazardous chemical inventory form for more than thirty-five oil and gas extraction storage facilities shall pay a base annual filing fee of twenty-five (\$25) dollars and an additional filing fee of ten (\$10) dollars for each facility in excess of thirty-five facilities.

9.8 An owner or operator of a retail gasoline dispensing facility that contains not more than ten tanks shall pay an annual filing fee of twenty-five (\$25) dollars.

9.9 An owner or operator of a retail gasoline dispensing facility of more than ten tanks shall pay an annual filing fee of twenty-five (\$25) dollars and five (\$5) dollars for each tank in excess of ten tanks.

9.10 An owner or operator of a facility, who is subject to this rule and who fails to submit the annual inventory filing fee by March thirty-first of each year shall pay to the SERC a late fee equal to twenty percent (20%) of the total fees due and owing the SERC.

9.11 All annual fees imposed by this Section 9 of this rule shall be payable to the SERC on or before the first day of March of each year.

9.12 In no event shall the total annual fees imposed on any one facility exceed the fees established under the provisions of W.Va. Code, §15-5A-5, exclusive of the late fee imposed by Section 9.10 of this rule.

9.13 A municipal corporation of this state which operates two or more facilities which are subject to the annual inventory filing fees imposed by this Section 9 may aggregate the fees for all such facilities and remit such fees with one reporting form as though all such facilities constituted a single facility.

§55-1-10. Grants.

10.1 The purpose of this procedure is to implement the emergency planning program grants as authorized by W.Va. Code §15-5A-5(k).

10.2 Grant Application Deadline Dates.

10.2.1 Emergency planning grant applications shall be received by the SERC no later than the thirtieth day of June of the grant year. Applications received after the established date shall not be considered for funding.

10.2.2 A mid-year report shall be submitted to the SERC by the first day of July of each grant year and shall include a report of the actual eligible expenditures incurred and a report of the activities accomplished under the grant through the thirty-first day of May of the grant year.

10.2.3 Amended applications to change grant requests must be received by the SERC no later than the first day of July of the grant year and shall indicate actual expenditures incurred by the LEPC and include a revised LEPC Emergency Response Plan as part of the justification for the requested change in the grant request. Requests for increased grant awards may only be approved by the SERC if sufficient revenue is available.

10.2.4 Requests for the first payment (up to twenty-five percent (25%) of the grant award) shall be made if the grant application is approved.

10.2.5 Second payment requests (up to twenty-five percent (25%) of the grant application) must be received by the SERC no later than the first of July of each grant year and shall include actual expenditures incurred by the LEPC through the thirty-first of May of the grant year. No second payments will be made for requests received after the first of July; those requests will be considered as part of the final close-out of the grant.

10.2.6 Grant close-out including reimbursement requests and certification of expenses must be received by the SERC no later than the first day of March of the next grant year. Payment will be made based on actual eligible documented

expenditures and completed LEPC Emergency Response Plan submission. If the required close-out information is not received by the SERC by the first day of March 1 and:

10.2.6.1 If no request for a second payment has been received, the SERC shall assume that the LEPC has had no eligible expenditures during the grant period and any payment shall be considered to be an overpayment, or

10.2.6.2 If a request for a second payment has been received, the SERC shall assume that the eligible expenditures reported on the request for second payment are the LEPC's total final eligible expenditures.

10.3 Any LEPC approved by the SERC may apply for an annual emergency planning grant. The following eligibility criteria apply to issuance of grants:

10.3.1 No later than January 1, 1993, the LEPC shall have completed and submitted:

10.3.1.1 An approved Local Emergency Planning Committee Hazardous Materials plan and updated, if required;

10.3.1.2 Met at least quarterly in the preceding year; and

10.3.1.3 Conducted at least one hazardous materials emergency response exercise during the preceding grant period and at least one hazardous material emergency response exercise (tabletop) each grant period.

10.4 All grant periods shall be on a calendar year beginning the first day of January of each year.

10.5 Any LEPC making application shall complete the required information on the forms prescribed by the SERC.

10.6 Final Grant and Reductions in Grand Awards. In order to be eligible for the full grant award, the LEPC must have incurred eligible expenses of at least the grant amounts and must have completed the required work activities as outlined in the grant proposal. If the LEPC fails to complete the required work activities, the final grant award and final payment of the grant shall be reduced.

10.6.1 The value of the grant is calculated as follows:

10.6.1.1 Work activities associated with planning shall be worth up to 70% of the grant;

10.6.1.2 Work activities associated with Local Emergency Planning Committee administration shall be worth up to 30% of the grant; and

10.6.1.3 Exercises shall be worth up to the maximum allowable amount for the type of exercise conducted.

10.7 The following shall constitute eligible costs for purposes of the grant program:

10.7.1 Personnel costs, including salary and fringe benefits, travel reimbursement for developing, reviewing and updating emergency response plans and for administration of the LEPC are eligible.

10.7.2 Copying, printing, postage costs associated with developing, reviewing, updating and publishing of emergency response plans and associated LEPC operations are eligible.

10.7.3 Each LEPC is eligible for funding during the grant year for certain costs of conducting hazardous materials emergency response exercises as determined by the SERC.

§§55-1-11. Enforcement.

11.1 The Chairman of the SERC may order a facility owner or operator to comply with the requirements of applicable federal law, W.Va. Code §15-5A-1 et seq. and these rules.

11.2 Upon failure of an owner or operator of a facility to comply with the provisions of applicable federal law, W.Va. Code §15-5A-1 et seq. or this rule, the Chairman may request the attorney general to commence an action for civil penalties, injunctive relief or other appropriate relief to enforce such provisions, rules or order.

11.3 Action may be brought in any federal district court having jurisdiction or in the circuit court of Kanawha County or the County where the facility or a major portion thereof is located.